IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§ CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

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I. INTRODUCTION

"The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding.... [T]he public at large pays for the courts and therefore has an interest in what goes on ***at all stages*** of a judicial proceeding." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (Posner, J.).[1] The Enron debacle has already cost American taxpayers countless millions of dollars. Bringing to justice those responsible for this national tragedy – and compensating the unwitting victims of defendants' actions – will add to this vast sum. Exceeding this tremendous cost is the public's interest in Enron that is boundless in its proportions and insatiable in its demand. Plaintiffs' motion details the public's legitimate and overwhelming desire to witness and understand this litigation, including the Court's role in fixing the wrongs wrought by white-collar criminals. Defendants cannot refute this truth. Rather, defendants argue that plaintiffs' motion is premature; they ignore that Enron has already been ordered to produce documents and the Court's recent Order Establishing Document Depository. Instead, defendants would hide their transgressions from public scrutiny and ask the Court's help to do so, which should be rejected.

II. ARGUMENT

A. Entry of an Umbrella Protective Order Is Not "Standard Practice"

"'***[I]t is well-established that the fruits of pretrial discovery are***, in the absence of a court order to the contrary, ***presumptively public***. Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown.'" *Phillips v. GMC*, No. 01-35126, 2002 U.S. App. LEXIS 21489, at *7-*8 (9th Cir. Oct. 15, 2002). Because ***the great weight of authority discourages the imposition of umbrella protective orders***, good cause is not easily shown.

Defendants urge a minority position not only shunned by courts and scholars, but anathema to the substantive law central to this case – full and fair disclosure under the securities laws. They want the Court to rubberstamp a confidentiality order to facilitate the production of documents, which they assert will encourage and simplify the exchange of information between the parties. *See*

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[1] All emphasis is added and all citations are omitted unless otherwise noted

Enron Brf. at 10-11, Andersen Brf. at 2-4, Enron Indiv. Defs' Brf. at 14-16, Bank Brf. at 5-6, 13. For this proposition, defendants cite *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355-57 (11th Cir. 1987) (per curiam), *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986), and *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118-23 (3d Cir. 1986). These cases are disfavored in their own circuits, are not binding authority in this Circuit, and represent a rejected minority position.

Defendants muddy the real issue. The question is ***not*** whether discovery documents should be made public over the parties' joint objection, ***but whether the Court should restrict plaintiffs' "First Amendment right to disseminate information [plaintiff] obtained in discovery."*** *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 205 (D. Colo. 2002) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)). Defendants assert that plaintiffs' reliance on *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987) is "misplaced" because "[s]ince *Agent Orange* ... Rule 5(d) has been amended.... The 2000 Amendment to the Rule eliminates any presumption that discovery materials should be made public." Bank Brf. at 18-19. Plaintiffs' First-Amendment rights exist irrespective of the change to Rule 5(d). The constitutional right exists even though "depositions and responses to discovery requests are not filed with the court unless the court orders filing." *Exum*, 209 F.R.D. at 205. Furthermore, *Agent Orange* is still good law, cited last month by the Ninth Circuit to uphold the ***"well established" presumption of public access to discovery***. *Phillips*, 2002 U.S. App. LEXIS 21489, at *8.

Enron's reliance on *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D N.Y. 1983), Enron Brf. at 11, 13, is peculiar. Judge Weinstein subsequently lifted that protective order because he believed, among other things, that "class members should be given access ***to the discovery material*** so that they may understand why their class representatives urged the Court to approve the settlement." *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 573 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987). Further, Judge Weinstein subsequently made clear that his views are more aligned with plaintiffs: "I start from the principle that everything in court should be public and nothing secret except the internal chambers discussions by judges with their clerks and various drafts of opinions.... ***Any sacrifice of confidence by shuttering off part of the sunshine through secrecy***

orders needs careful consideration and justification." *See* Jack B. Weinstein, *Secrecy and the Civil Justice System Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & Pol'y 53 (2000).

Writing for a unanimous panel, Chief Judge Posner of the Seventh Circuit considered and rejected the propriety of a confidentiality order that both parties had stipulated to – an order that closely resembles those submitted by defendants here (which plaintiffs object to). Notably, Judge Posner rejected the very cases defendants in this action cite:

> We are a mindful of the school of thought that blanket protective orders ("umbrella orders"), entered by stipulation of the parties without judicial review and allowing each litigant to seal all documents that it produces in pretrial discovery, are unproblematic aids to the expeditious processing of complex commercial litigation because there is no tradition of public access to discovery materials. *E.g.*, *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355-57 (11th Cir. 1987) (per curiam); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118-23 (3d Cir. 1986); Manual for Complex Litigation §21.432 (3d ed. 1995); Richard L. Marcus, "The Discovery Confidentiality Controversy," 1991 U. Ill. L. Rev. 457; Marcus, "Myth and Reality in Protective Order Litigation," 69 Cornell L. Rev. 1 (1983). ***The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials*** .... And we note that both the First and Third Circuits, which used to endorse broad umbrella orders (*e.g.*, *Cryovac*, *Cipollone*), have moved away from that position (*Public Citizen*, *Glenmede*, *Pansy*, *Leucadia*).

Citizens First Nat'l Bank, 178 F.3d at 945-46.

This case makes for an even stronger presumption against issuing a protective order than did *Citizens First Nat'l Bank*. Not only is there a more substantial public interest in this action, but *Citizens First Nat'l Bank* involved a protective order stipulated to by the parties. "We are dealing here not with the right of reporters to gather information ***but with the right of individuals to disseminate it.***" *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 474 (5th Cir. 1980) (en banc) (overturning as violation of Rule 23 and First Amendment order limiting communications between counsel and class members), *aff'd*, 452 U.S. 89 (1981).

B. The Overwhelming Public Interest in This Action Weighs in Favor of Keeping These Proceedings Open; Defendants' Burden Is High

"The public airing of grievances is the fundamental means by which the integrity of the judicial process is preserved." *Andrew Corp. v. Rossi*, 180 F.R.D. 338, 343 (N.D. Ill. 1998). Defendants' proposed orders, "'***umbrella' protective orders, are typically permitted only ... with much hesitation.***" *Id.* at 342. "Public access preserves important interests, serving 'to promote

trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness.'" *De Los Angeles Ramirez v. GMC*, No. L98-122, 1999 U.S. Dist. LEXIS 22483, at *2 (S.D. Tex. Dec. 10, 1999) (quoting *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993)). Transparency, a venerable tenet of Anglo-American jurisprudence, is important whether or not there is a palpable public interest in a particular matter. Here, the public's interest in the Enron proceedings is not merely palpable, but undeniable.

1. Public Interest in the Enron Debacle Remains Strong

This is not an ordinary case. Defendants' conclusory arguments – masquerading as good cause for their proffered protective orders – do not counterbalance the keen public interest in this litigation. What constitutes good cause in one case, may not suffice in another. "In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994) (reversing district court order denying intervention to lift protective order). "***A factor which a court should consider in conducting the good cause balancing test is ... whether the case involves issues important to the public***." *Id.* at 788. Likewise, the Ninth Circuit held: "If a court finds particularized harm will result from disclosure of information to the public, ***then it balances the public and private interests to decide whether a protective order is necessary***." *Phillips*, 2002 U.S. App. LEXIS 21489, at *9.[2] Thus, the Bank Defendants are wrong to assert – ***without citation to any***

[2]*See also Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) ("A party seeking a protective order over discovery materials must demonstrate that 'good cause' exists for the protection of that material. Fed. R. Civ. P. 26(c).... Although we have recognized that the district court is best situated to determine what factors are relevant to the dispute, we have cautioned that ***the analysis should always reflect a balancing of private versus public interests***."); *United States v. Gaynor*, No. 01C4753, 2002 U.S. Dist. LEXIS 4375, at *3-*4 (N.D. Ill. Mar. 14, 2002) (denying protective order and holding: "'As a general proposition, pretrial discovery must take place in ... public unless compelling reasons exist for denying the public access to the proceedings. That standard is embodied in Rule 26(c), which permits the Court to issue a protective order only "for good cause shown." To determine whether good cause exists, ***the Court must balance the public's interest in the proceeding against the "property and privacy interests of the litigants***." Good cause exists "only if the latter interests predominate in [a] particular case."'"); *Cohen v. Brown Univ.*, No. 99-485-B, 2000 U.S. Dist. LEXIS 7091, at *7 (D.N.H. May 12, 2000) (vacating protective order granted by magistrate and holding: "***When the parties call upon a judicial officer to resolve such an important dispute, the public has a substantial interest in having access to information that may have a bearing on the decision-making process, regardless of whether the information***

authority – that: "under Rule 26(c), the relevant interests are those of the parties involved in the action and the sole inquiry for the Court is whether there has been a showing of 'good cause' by the proponents of the protective order." Bank Brf. at 11. They fail to confront the very important issue of countervailing public interests, which make their burden of showing good cause extremely difficult.

Public interest in, and scrutiny of, the Enron debacle continues unabated. News agencies recognize this, and have moved to intervene to prevent defendants from obtaining the protective orders at issue. *See* Motion to Intervene of Dow Jones & Co., Inc., The New York Times Co., The Washington Post, USA Today, The Houston Chronicle, ABC and the Reporters' Committee for Freedom of the Press. Indeed, every decision the Court makes is newsworthy. National newspapers, and those around the world, reported on the Court's sentencing of defendant Andersen for its criminal violations.[3] Even decisions of a peculiarly procedural nature, more interesting to legal academics than the masses, are reported on. For example, *The Houston Chronicle* reported on the Court's decision that certain plaintiffs' claims should not be consolidated with the *Newby* action, emphasizing the importance of discovery in this action: "Harmon also ruled that the state cases, Brenham's included, may not precede her cases into ***discovery, the extensive and critical period of the trial in which each side collects evidence and testimony from the other***." *See* Mary Flood, "Four Federal Enron Suits Shipped Back to State Courts" *Houston Chron.*, Sept. 12, 2002 (Ex. 4).

Further, the Court's decisions have tremendous ramifications, which will affect and are the focus of financial markets. For example, in anticipation of the Court's ruling on defendants' motions to dismiss, a Prudential financial analyst issued a report stating: "We expect a ruling by the judge

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concerns the merits of plaintiffs' underlying claims. In any event, Brown's argument turns on its head the presumption in Rule 26(c) that ***discovery material*** obtained for a legitimate purpose should be available to the public absent a showing of good cause for nondisclosure."); *Cook Inc. v. Boston Scientific Corp.*, 206 F.R.D. 244, 246 (S.D. Ind. 2001) (rejecting parties' stipulated protective order in patent infringement case, holding: "The 'good cause' standard requires a balancing of the public and private interests involved.").

[3]*See, e.g.*, "Judge Fines Andersen," *The Daily Telegraph (London)*, Oct. 17, 2002; Ameet Sachdev, "Analysts: Andersen's 5-Year, $500,000 Penalty Mostly Moot," *Orlando Sentinel Tribune*, Oct. 17, 2002; "Andersen's Ties With Tissue Maker Studied; Company Fined $500,000 For Obstruction," *Seattle Post-Intelligencer*, Oct. 17, 2002 (attached hereto as Exs. 1-3; all Exhibits are attached to the brief).

in the Enron lawsuit as to whether to dismiss the lawsuits against Citi and other banks or whether to move ahead. ***This is the most important event yet with regard to the Enron investigation as it relates to Citi.***" Prudential Financial, "Issues Continue to Mount; Downgrade From Hold to Sell," Sept. 3, 2002 (Ex. 5). The Prudential report cited "Litigation Risk and 'Judge Harmon Day'" for its downgrade of Citigroup's stock, which, in response, dropped ten percent (approximately $17 billion in market capitalization). *See, e.g.*, Joshua Chaffin, et al., "Citigroup Shares Routed on Risk Fears," *Financial Times (London)*, Sept. 4, 2002 (Ex. 6). News of the Prudential report – speculation concerning the Court's pending ruling – was reported around the world *See, e.g.*, "Citigroup drops in prebourse trade after Prudential cuts to 'sell,'" *AFX-Asia*, Sept. 3, 2002 ("By late September, Judge Harmon will likely decide whether to reject motions to dismiss Enron lawsuits against Citigroup ....") (Ex. 7).

Persons at the highest level of government, servants of the citizenry that elect them, continue to address Enron related issues. The chief investigator for the Permanent Investigations Subcommittee testified that:

> The evidence indicates that Enron would not have been able to engage in the extent of the accounting deceptions it did involving billions of dollars, were it not for the active participation of major financial institutions willing to go along with and even expand upon Enron's activities. The evidence also indicates that some of these ***financial institutions knowingly allowed investors to rely on Enron financial statements that they knew or should have known were misleading***.

Testimony of Robert Roach, July 23, 2002 (Ex. 8); *see also* David Ivanovich & Michael Hedges, "The Fall of Enron; Enron's banking deals hid debt; True bottom line veiled, panel told," *Houston Chron.*, July 24, 2002 (Ex. 9). Public interest in these findings prompted newspapers and magazines across the globe to prominently report on the panel's findings.[4] This Congressional and media

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[4]*See, e.g.*, Jill Treanor, "Banks knew of Enron scam," *The Guardian (London)*, July 24, 2002 ("After a seven-month investigation and more than 1 m[illion] pages of documents, Robert Roach, chief investigator for the committee on investigations, said: 'The evidence we reviewed showed that ... financial institutions were aware that Enron was using questionable accounting'") (Ex. 10); "Enron prober hits banks; Transactions helped disguise woes, he says," *Chicago Tribune*, July 24, 2002 ("The banks used complex financial transactions to boost Enron's anemic cash flow to match its profit growth on paper, according to lawmakers.") (Ex. 11); Rodney Dalton, "Loans fiddled as Enron burned," *The Australian*, July 25, 2002 ("Congressional investigator Robert Roach told a hearing that Wall Street investment banks had knowingly helped Enron disguise debt in return for large fees.") (Ex. 12).

scrutiny counters the Bank Defendants' assertion that plaintiffs "focus heavily on the misdeeds of Enron and argue, in essence, that the Bank Defendants are therefore presumed to be liable for securities fraud because they did business with Enron." Bank Brf. at 3-4. That is ***not*** the case.

Similarly, an initial report by the New York Bankruptcy Court's Examiner, stated: "Enron was prolific in its use of highly complex structured finance transactions using SPEs, with the result that ***billions of dollars of recourse obligations were not disclosed as debt in Enron's balance sheet, and the proceeds of these recourse obligations were reported as revenue and cash flow.***" First Interim Report of Neil Batson, Court-Appointed Examiner at 22, dated Sept. 21, 2002 (Ex. 13). Newspapers made the report's findings headline news. For example, *The New York Times* wrote:

> ***Mr. Batson's report provides possible signals for the criminal case. With evidence scattered throughout the report that accountants, executives and bankers failed to take actions that they otherwise would have*** for transactions that were actual sales, the deals provide certain levels of proof that participants may have been acting with a wink and a nod when providing loans disguised as sales. In essence, ***the credibility of the accountants, lawyers and bankers could be challenged by their failure to obtain certain necessary documentation or to price loans at an appropriate rate.***
>
> There are strong reasons for the government to crack down on the types of financial finagling that took place at Enron. Ultimately, by using legitimate rules to disguise the true nature of its finances, ***the company undermined the disclosure rules that lie at the foundation of the American capital markets.*** By engaging in transaction after transaction that pushed close to -- and in some cases over -- the literal requirements of the accounting rules, Enron was able to create an image in its financial disclosures of a company that simply did not exist.

Kurt Eichenwald, "The Findings Against Enron," *N.Y. Times*, Sept. 22, 2002 (Ex. 14).

In sum, this is no ordinary case between litigants wishing to settle a private dispute. ***This is an action of historic proportions*** that ***involves public companies*** owned by millions of stockholders, ***public financial institutions*** that manage the resources of millions of taxpayers and employees, ***public markets*** and ***a public institution – this Court***. The need for transparency in these proceedings cannot be overestimated, and militates against finding good cause to issue any protective order.

2. The Public's Interest in This Action Is Not Satisfied by Collateral Government Action

Defendants make the unsubstantiated argument that numerous government investigations concerning defendants' role in the Enron fraud are sufficient to satisfy the public's interest in the

collapse of Enron. *See, e.g.*, Enron Brf. at 9 ("Plaintiffs seek to fulfill a role that has already been taken by the government. Their participation is not necessary."). But unless the government intends to compensate the victims of this fraud, plaintiffs and their counsel ***are*** necessary. Further, the public's interest is not limited to defendants' actions as a general matter, but also concerns this litigation specifically. The public's interest as to whether the victims will successfully press their claims will not be satiated by the findings of any Senate subcommittee. The efficacy of private securities litigation has been, historically, a hotly debated issue among the legal and political communities – now it is at the fore in the broader community.

Furthermore, to adopt defendants' argument would add to the needless waste of time, money and resources resulting from Enron's collapse. Defendants do concede that numerous government entities are investing limited time and resources to investigate defendants' actions. Lead Counsel and the counsel for individual plaintiffs in numerous state-court proceedings are doing the same. These investigations significantly overlap, and, contrary to defendants' argument, there is no reason to duplicate discovery efforts. Indeed, courts confronting the issue of duplicating discovery have held:

> "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings. ***This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues***, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process ...."

Bell v. Chrysler Corp., No. 3:99-CV-0139-M, 2002 U.S. Dist. LEXIS 1651, at *5 (N.D. Tex. Feb. 1, 2002) (quoting *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)).[5] Accordingly, Judge Gonzalez has already admonished the Enron Creditors' Committee and the Examiner to coordinate discovery with this case. Interestingly, certain Banks Defendants urged Judge Gonzalez to order coordination with the securities case in Houston.

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[5]Bank Defendants append the protective order stipulated to by the parties in *Retirement Sys. of Alabama v. Merrill Lynch & Co.*, CV 2002-738-H, pending in the Circuit Court for Montgomery County, Alabama, proposing that it "serve as a template for the order in this case." Bank Brf. at 7. The order is unaccompanied by any finding of good cause as is required by federal law. For this reason alone it should not be considered persuasive. Further, it is likely (but impossible to determine without additional information not provided by defendants) that the state court only issued the protective order to avoid interfering with this Court's discovery stay imposed under the PSLRA

C. Defendants' Purported "Good Cause" Would Be Insufficient in an Ordinary Case, and Falls Far Short in This Extraordinary Case

As the party seeking a confidentiality order, it is defendants' burden to show good cause. "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that 'the burden is upon the movant to show the necessity of its issuance, ***which contemplates a particular and specific demonstration of fact*** as distinguished from stereotyped and conclusory statements.'" *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998); *see also Phillips*, 2002 U.S. App. LEXIS 21489, at *8 ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted."); *Pansy*, 23 F.3d at 786-87.[6] "If a court finds particularized harm will result from disclosure of information to the public, ***then it balances the public and private interests to decide whether a protective order is necessary***." *Phillips*, 2002 U.S. App. LEXIS 21489, at *9; *see also* §B.1 (listing cases). Defendants cannot meet this burden.

1. Defendants' Concern for Judicial Resources Is More Self-Serving Than Genuine, and Does Not Satisfy Their Burden

Defendants urge the Court to issue a protective order not merely to safeguard their rights, but to conserve the limited judicial resources and streamline this litigation. *See, e.g.*, Bank Brf. at 2 (protective orders relieve "the courts of the ***chore*** of determining" discovery issues). Not only do defendants offer mere pretext in the hopes that the Court will shade their transgressions from the "the abstract virtues of sunlight as a disinfectant," *Wilk*, 635 F.2d at 1299, the purported efficiency of their umbrella protective orders wilts when subject to the light of scrutiny.

There is no substantial reason to believe that an umbrella protective order will conserve the Court's resources or streamline this case. With respect to discovery, courts are decidedly mixed as to whether confidentiality orders preserve judicial resources or streamline litigation. *See, e.g., John Does I-VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986) (noting that although there is a belief that blanket orders serve interests of judicial economy, the court stated that ***blanket orders "often create***

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[6]Therefore, the Bank Defendants are ***incorrect*** in claiming that plaintiffs' motion "lacks any substantive merit because Plaintiffs have not shown why a standard Rule 26 protective order would be inappropriate here." Bank Brf. at 3. The burden is properly on defendants to show why such an order is appropriate – not vice versa.

more problems than they solve"). The court in *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 89 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir. 1987), explained why.[7] In *Cipollone*, the defendant requested a broad blanket order to facilitate discovery and streamline the litigation, but Judge Sarokin rejected this "public policy" argument, and indicated that umbrella orders, far from unburdening the court of discovery disputes, forced plaintiffs to seek sanctions against defendants for a bad faith "confidentiality designation " *Id.* at 92-94. An umbrella protective order would not end the problems associated with discovery, it would merely tilt the playing field in favor of defendants. Thus, defendants' protective orders could result in more (not less) litigation and the use of more (not less) judicial resources.

Furthermore, defendants miss the point. Court proceedings are not only about efficiency. The benefits of transparency more than balance the costs associated with minimal delays and the reasonable expenditure of judicial resources to rule on discovery disputes.

2. Documents Produced to Government Investigators Should Not Be Confidential in This Action, and No Umbrella Protective Order Should Issue Because of Collateral Government Investigations

Defendants claim that because they were "***forced*** by the governmental demands for timely production to produce millions of pages of documents," the Court should "deem all documents produced in the litigation confidential." Enron Brf. at 10, 12. They cite neither law for this proposition nor statute or regulation suggesting that any of the documents produced to the government were to be kept confidential, or that any such statute or regulation has any effect in this action. Defendants' argument is merely this: because they produced documents to the government in reliance on a *de facto* protective order, the Court should recognize that *de facto* protective order.

To the contrary, even when a party has produced documents in reliance on a ***real*** protective order, a district court has broad discretion to lift it. "Control of pretrial discovery, including the entry ***or modification of a protective order, is a matter falling peculiarly within the discretion of the***

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[7]Notably, *Cipollone*, 113 F.R.D. 86 was "before the court pursuant to defendants' receipt of a writ of mandamus from the Third Circuit" in *Cipollone*, 785 F.2d at 1118-23, which defendants cite, is now considered the ***minority*** position. Moreover, ***the district court refused to grant a protective order***.

district court." *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988); *see also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("[M]odification of a protective order, like its original entry, is left to the discretion of the district court."). "Some circuits even suggest that district courts have more discretion in this area than in other areas." *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us*, 62 F.3d 1217, 1219 (9th Cir. 1995). And defendants cannot claim that they relied on any purported agreement by the government to maintain the confidentiality of produced documents because they admit the government "forced" them to produce documents. Enron Brf. at 12.

3. Purported Privacy Concerns Do Not Justify the Issuance of an Umbrella Protective Order

Claiming that they will "endeavor to minimize the production of information pertaining to clients other than Enron," defendants assert "it ***may*** be unavoidable" that irrelevant information is produced and claim an umbrella protective order is "necessary" to provide "protection[] in the event of ***inadvertent*** production." Andersen Brf. at 9. Plaintiffs and the public should not be further penalized because Andersen ***may*** make an ***inadvertent*** mistake. Certainly, this is not the "***particular and specific demonstration of fact***" required by the Fifth Circuit. *Terra*, 134 F.3d at 306. Further, legitimate non-party privacy issues are dealt with by plaintiffs' proposed Order Regarding Confidentiality, which states its intent to conform with General Order No. 2002-9, dated July 22, 2002. Despite this, defendants claim a need for an umbrella protective order – covering all documents produced in this action – by asserting non-party privacy interests. This argument fails not only because defendants do not meet their burden, but also because their customers have no legitimate privacy interest. Indeed, any actual privacy issues do not warrant the secretion of ***all*** documents produced in discovery and the public interest substantially dwarfs the privacy issues raised by defendants.

Defendants' privacy arguments all fall far short of good cause. Enron asserts that it is a "party to hundreds of contracts with third parties that require Enron to keep the details of those contracts, and any transactions conducted under them, confidential." Enron Brf. at 8. But it cites no authority for the proposition that these documents should be subject to a protective order. And Lead Counsel

knows of no authority suggesting that one party to a proceeding may enter into a private contract that is both binding on its adversary and the Court. Enron's argument cannot be the law, as it would undeniably enable a defendant to unilaterally limit the Court's power to manage its docket and settle disputes concerning discovery, powers both inherent and granted by statute. Enron's argument would enable litigants to avail themselves of the public courts, but remove the public's interest from Rule 26's good-cause test.

Andersen and the Bank Defendants propose a similarly doomed argument. Andersen argues that it "owes ethical, contractual and statutory duties to keep [clients'] information confidential." Andersen Brf. at 8. The Supreme Court has held that "'***no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases***.'" *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984).[8] The Bank Defendants likewise claim that an umbrella protective order is necessary because (they claim) that their "customers have a ***legitimate expectation of privacy*** in their dealings with the Bank Defendants and the disclosure of customer confidences would result in harm to both the customers and the banks." Bank Brf. at 10. But they cite ***no authority*** for their proposition and fail to recognize that: "'There is ***no banker-client privilege***.'" *United States v. Nelson*, 486 F. Supp. 464, 483 (W.D. Mich. 1980) (noting that the Supreme Court, in *United States v. Miller*, 425 U.S. 435 (1976), "implicitly agreed" with this position). "There simply is ***no inherent right of privacy*** with regard to the contents of a bank customer's checks, deposit slips ***and other banking documents***. Therefore, unless some statutory right to privacy exists, ***a bank customer has no legitimate expectation of privacy with regard to bank documents pertaining to his business with the bank. The documents are just business records of the bank***." *Employers Ins. of Wausau v. FDIC*, No. Civ-3-85-311, 1986 U.S. Dist. LEXIS

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[8]Andersen cites several inapposite authorities. Andersen Brf. at 8-9. *In re Chekosky*, 23 F.3d 452, 486 n.23, n.25 (D.C. Cir. 1994), merely recognizes that accountants have ethical obligations under their own Code of Professional Conduct, but *Chekosky* does not assert that courts are bound to tailor the Federal Rules of Civil Procedure in accordance therewith. Andersen's numerous citations to state law concerning accountants' privileges have no bearing in this proceeding. *See* Federal Rules of Evidence 501. Further, "in federal question cases in which state law claims are also raised, any asserted privileges relating to evidence relevant to both state and federal claims are governed by federal common law." 6 James Wm. Moore, *Moore's Federal Practice* §26.47[4] (3d ed. 2001).

26562, at *5 (E.D. Tenn. Apr. 18, 1986). Because there is no banker-client privilege or privacy right infringed by plaintiffs' discovery request, there is no substantial need for a protective order that will work to the detriment of the public interest.

4. Defendants Have Not Shown Good Cause to Issue an Order Secreting Discovery Concerning Trade Secrets

"'[T]here is no absolute privilege for trade secrets and similar confidential information.'" *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 362 (1979). "[T]o rule that certain confidential business information may be categorically protected treads dangerously close to the Supreme Court's prohibition. Furthermore, to do so would essentially create an exception to the procedure outlined in Rule 26(c) where no such exception exists." *Andrew*, 180 F.R.D. at 342. Defendants make conclusory assertions that an umbrella-type protective order is necessary to protect confidential or sensitive business information. But "***bald assertions of confidentiality, such as a statement by a movant that 'disclosure could ... harm [the movant's] competitive position' is insufficient.***" *Zahran v. Trans Union Corp.*, No. 01C1700, 2002 U.S. Dist. LEXIS 16791, at *5 (N.D. Ill. Sept. 5, 2002) (citing *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002)). Defendants here assert little else.

The Bank Defendants' argument is a blanket assertion that documents responsive to plaintiffs' discovery requests will include "information relating to the banks' internal operations, strategies, credit exposure and internal finances." Bank Brf. at 10. This hardly carries their burden.

> Where the proponent of the protective order contends that the materials at issue contain trade secrets, for example, the court must first determine whether such assertion is true. To present a prima facie case for trade secret protection, the proponent of the protective order must prove that it consistently treated the information as a secret and took steps to guard it, the information is of substantial value to the proponent, the information would be valuable to the proponent's competitors, and the information "derives its value by virtue of the effort of its creation and lack of dissemination." If the proponent fails to satisfy this first inquiry, then no "good cause" exists for the protective order. If satisfied, however, the court must then weigh the proponent's interest in confidentiality against the public's interest in access before ultimately deciding whether to issue the order.

Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1366 (N.D. Ga. 2002); *see also Andrew*, 180 F.R.D. at 341. "[T]o show good cause a party must 'demonstrate that disclosure of allegedly confidential information will work a ***clearly defined and very serious injury***

to his business.'" *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988) (denying defendants protective order seeking to "limit the dissemination of Yahama's purported trade secrets" because "conclusory allegations, in an attorney's affidavit" were not sufficient to show good cause); *see also Cook*, 206 F.R.D. at 248 (rejecting stipulated protective order because parties in a patent infringement case failed to "submit a proper definition of trade secrets ... so that the Court can be confident that the parties will make good faith and accurate designations of specific information"); *Andrew*, 180 F.R.D. at 341 (denying motion for a protective order and requiring "specific showing of good cause" and rejecting defendants' "'common sense' approach to the good cause requirement"). The Bank Defendants have shown no impending "clearly defined" or "serious" injury sufficient to satisfy their burden, and certainly have not demonstrated why these interests trump those of public disclosure.

Enron seeks to secrete its "proprietary information including contractual term and rate information, database information detailing transactional data for all of Enron's natural gas, energy, and other commodity trades, information as to how Enron analyzes markets, including price curves and daily position reports, and Enron trading and risk management strategies." Enron Brf. at 7. This argument flies in the face of common sense and the law. It is impossible to determine what exactly Enron is referring to. It seems evident that the documents Enron seeks to conceal are at the heart of a criminal enterprise. *See, e.g.*, Rebecca Smith & John R. Wilke, "Top Trader for Enron Admits to Fraud in California Crisis," *The Wall St. J.*, Oct. 18, 2002 (Ex. 15). Courts of law are not meant to hide illegal activity, but unearth it and punish it: "We can strike a fair balance between the privacy interests of a corporation and the health and safety of the public ***so long as we recognize that a publicly maintained legal system ought not protect those who engage in misconduct, conceal the cause of injury from the victims, or render potential victims vulnerable***. Secrecy in such instances defeats a function of the justice system - to reveal important legal factual issues to the public." Weinstein, *supra*, 9 J.L. & Pol'y at 61.

Defendants have not shown good cause to secrete any documents because they contain trade secrets. Nonetheless, they would have the Court conceal from the public every document produced in this litigation – whether or not these documents contain any information at all connected to any

purported trade secret. This position is untenable. Assuming any showing of good cause, this would only justify the provision of a confidentiality order with respect to the specific documents (or types of documents) for which the burden had been met. Defendants cannot assert that a particular document contains a trade secret, and then justify an umbrella protective order governing their entire production.

D. Any Restriction on Lead Counsel's Communications with Lead Plaintiff or Members of the Class Must Comply with the First Amendment and Rule 23

The Court ought not conceal crucially important information from persons with a very real and important interest in the case – members of the Class. Defendants' proposed umbrella protective orders will severely limit Lead Counsel's and Lead Plaintiff's ability to communicate with Class members. For example, the Enron Individual Defendants' proposed confidentiality order clearly states that "all discovery materials, including without limitation Confidential Material, Highly Confidential Material, ***and the contents thereof***, shall not be disclosed ***to anyone*** other than those persons and parties described in paragraph 10 hereof and to the court." Enron Indiv. Defs' Brf., Ex. B, ¶7. Paragraph 10 does not include members of the Class or even the named parties. It is clear that defendants seek to restrict communications between Class counsel and members of the Class. Such restrictions should not be made lightly.

The Supreme Court has held that when courts "impose sweeping limitations on communications by named plaintiffs and their counsel to prospective class members" they must do so in compliance with Rule 23(d). *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 199 (1981). The Court held:

> [A]n order ***limiting communications between parties and potential class members*** should be based on a clear record and ***specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties***. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing – ***identifying the potential abuses being addressed*** – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Id at 101-02 (footnotes omitted). Further, in *Bernard*, the Fifth Circuit vacated and reversed the district court's imposition of a protective order "***limiting communications*** by parties and their

counsel with actual or potential class members." 619 F.2d at 464. The en banc panel held that the "district court's order restricting communication by parties and their counsel with actual and potential class members is an unconstitutional prior restraint." *Id.* at 477.

Despite this precedent, defendants contend that: "The First Amendment is not a concern." Enron Brf. at 5. They also contend that: "Because non-representative class members do not participate in the prosecution of an action, there is no need disclose discovery material to them." Bank Brf. at 4. As demonstrated here, courts and legal scholars disagree. Defendants also argue that Lead Counsel has moved the Court for the right to speak with Class members because it "has from the beginning sought to prejudice potential jurors against Defendants through the media." Enron Indiv. Defs' Brf. at 14. Such an incendiary statement ought to be supported by a smoking gun. Defendants have none. ***The articles they cite contain no improper statements by Milberg Weiss attorneys***. The Enron Individual Defendants only quote one article for the mere fact that in "a 'cross-country marathon' in Bill Lerach's private jet ... he 'talked for hours' about his view of this case" with a reporter from *The New Yorker*. *Id.* at n.9. ***Defendants do not quote or cite a single improper statement made by Lead Counsel or Lead Plaintiff***. They are merely trying to prejudice the Court. That an individual involved in this lawsuit uses private aircraft is irrelevant, but it is ironic that Ken Lay has raised this issue. *See* Robert Bryce, "Flying High Enron's Air Fleet Was a Celestial Playground for Company Bigshots, and According to One Pilot, Chairman Ken Lay Was the Biggest Abuser of All," *The Boston Globe*, Sept.19, 2002 (Ex. 16).

Generally speaking, members of a class need information concerning litigation in which they are an un-named party.[9] That need is particularly strong here. As demonstrated by the overwhelming number of movants for Lead Plaintiff, many Class members are keenly interested in this action. These plaintiffs have a strong and legitimate desire to monitor the progression of the

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[9]*See, e.g.*, Jack H. Friedenthal, *Secrecy and the Civil Justice System Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & Pol'y 67, 76-77 (2000) ("Class actions, and others in which persons outside the court may be bound by in-court representatives, also require special consideration .... ***Obviously an unnamed class member cannot make a seasoned decision as to what steps he or she might take in a situation if key information is held in secret. In such situations, a heavy burden must be placed on those who would limit access***; and even if that burden is met, ways must be found to prevent injustice.").

case, its relative strengths and weaknesses, and Lead Counsel's and Lead Plaintiff's efforts. Effective monitoring of these proceedings would be impossible without an ability to see and discuss crucial discovery. The Court should not restrict plaintiffs' First Amendment rights and Rule 23 responsibilities to discuss these matters with Class members.[10]

E. Defendants' Proposed Confidentiality Orders – Both Overbroad and All-Consuming – Clearly Demonstrate Defendants' Intent to Hide the Truth and Prejudice Plaintiffs

Defendants' finely worded briefs and delicately balanced legal arguments are a Trojan Horse to introduce, for the Court's signature, confidentiality orders so overbroad that they mock the Constitution and the Federal Rules. Defendants make their hypocrisy clear. While their briefs talk of trade secrets and personal information, defendants' proposed confidentiality orders are not so limited.

Defendants' proposed orders are unlawful. The law does not countenance their attempt to deny the public and the plaintiffs their right to review and disseminate documents produced in discovery, as defendants would have this Court believe. "***Parties to litigation have a First Amendment right to disseminate information they obtained in discovery absent a valid protective order.***" *Exum*, 209 F.R.D. at 205 (citing *Seattle Times*, 467 U.S. 20). The Seventh Circuit recently struck down a confidentiality order for overbreadth, even though the case before it was of relatively little public interest and the parties had stipulated to a confidentiality order:

> The order that the district judge issued in this case is not quite so broad as "seal whatever you want," but it is far too broad to demarcate a set of documents clearly entitled without further inquiry to confidential status. The order is not limited to trade secrets, or even to documents "believed to contain trade secrets," ***which anyway is too broad*** both because "believed" is a fudge and because a document that contains trade secrets may also contain material that is not a trade secret, in which case all that would be required to protect a party's interest in trade secrecy would be redaction of portions of the document. ***Also much too broad*** is "other confidential

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[10]Cases cited by defendants are inapposite. For example, the Bank Defendants cite *Longmen v. Food Lion, Inc.*, 186 F.R.D. 331, 333-34 (M.D.N.C. 1999), claiming it held that "desire to provide discovery material to class members and public at large not 'good cause' to modify protective order." Bank Brf. at 17. This makes no sense because it is defendants, not plaintiffs, that have the burden of proving good cause to have the Court issue a protective order. *See* §II.C. Further, the *Longmen* court stated that "***because Plaintiffs agreed to the protective order and the sealing provisions, the First Amendment and presumption of access arguments are not available to support Plaintiffs' request.***" *Longmen*, 186 F.R.D. at 335. Here, ***plaintiffs never agreed to any such broad protective order.***

> ... information," not further specified, and all "governmental information," ***a category absurdly overbroad***. The order is so loose that it amounts, as we suggested at the outset, to giving each party carte blanche to decide what portions of the record shall be kept secret. ***Such an order is invalid.***

Citizens First Nat'l Bank, 178 F.3d at 945.

Defendants do not even try to limit the breadth of their proposed confidentiality orders. They would have the Court preclude the dissemination of any documents to the public. For example, in the Enron Individual Defendants' proposed confidentiality order, "***all discovery materials, including without limitation Confidential Material, Highly Confidential Material, and the contents thereof, shall not be disclosed to anyone*** other than those persons and parties described in paragraph 10 hereof and to the court." Enron Indiv. Defs' Brf., Ex. B, ¶7. Paragraph 10, which (in conjunction with ¶7) dictates who would be allowed to review any documents produced in discovery under this proposed protective order, does not even include the parties to this litigation. Thus, the Enron Individual Defendants' proposed confidentiality agreement would not even let The Regents access the very things it needs to make informed decisions about the merits of the lawsuit. The absurdity of such an order is clear. Enron's proposed protective order likewise seeks an umbrella protective order for "[a]ll documents and depositions produced ... in the course of the pretrial stage of these proceedings." Enron Brf., Ex. B, ¶3. "The Bank Defendants propose that the order in the Alabama Action serve as a template for the order in this case," which precludes the disclosure of "[a]ll materials produced in discovery by the parties." Bank Brf. at 7 and Ex. E, ¶7.

Defendants do not stop with limitations on discovery, but seek to impede the public's access to traditional judicial proceedings. For example, Enron's proposed protective order states that "All 'discovery material,' if filed with the Court, shall be filed under seal." Enron Brf., Ex. B, ¶4. Likewise, the Enron Individual Defendants' proposed confidentiality order substantially limits the filing of Confidential documents with the Court and their use at trial or in a hearing. Enron Indiv. Defs' Brf., Ex. B, ¶¶11, 19. Under their confidentiality order, before using confidential documents in open court, plaintiffs would have to give seven days notice to defendants and discuss "the need for disclosure of the confidential information." *Id.* at ¶19(b). Such a ruling would handcuff plaintiffs' prosecution and give defendants unwarranted control over court proceedings and forewarn

them about plaintiffs' strategies. *See, e.g., John Does I-VI*, 110 F.R.D. at 634 ("defendants' proposal for five days' notice and in camera inspection of exhibits would be unduly burdensome and perhaps prejudicial").

F. That Plaintiffs' Counsel Has Agreed to Protective Orders in Other Cases Is Irrelevant

Much like a spoiled child who feels entitled to a treat, defendants suggest they are entitled to a protective order in these proceedings because "Plaintiffs' counsel enter into such protective orders" in other actions. Bank Brf. at 2. Whether ***Lead Counsel*** agrees to confidentiality agreements in other actions, which differ from this highly visible action, is irrelevant. While the pending motion is signed by Lead Counsel, the decision to submit it was made by the real party in interest: "The Regents of the University of California ("The Regents"), as Lead Plaintiff and on behalf of all plaintiffs consolidated thereunder, respectfully submits this Memorandum of Law in Support of Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order." Plaintiff's Motion at 1. *See, e.g., Richards v. Reed*, 611 F.2d 545, 546 n.2 (5th Cir. 1980) (citing *United States v. 936.71 Acres of Land*, 418 F 2d 551, 556 (5th Cir. 1969)) ("***the "real party in interest" is the party who, by substantive law, possesses the right sought to be enforced***"). Furthermore, there is nothing improper about Lead Counsel (or Lead Plaintiff for that matter) agreeing to confidentiality agreements in some cases but not others because the propriety of such an agreement is a fact-intensive analysis varying from case to case.

III. CONCLUSION

It is defendants' burden to show good cause why these proceedings should be shuttered from the bright light of public scrutiny, and defendants have not met this burden. No umbrella protective order should issue.

DATED: November 7, 2002

Respectfully submitted,

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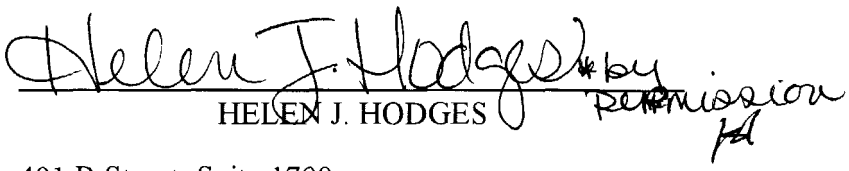

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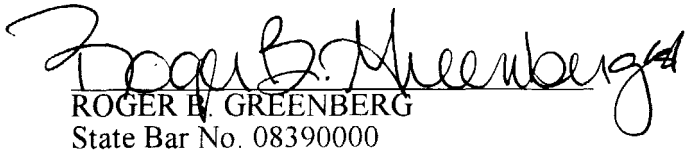

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DECLARATION OF SERVICE BY WEBSITE AND UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on November 7, 2002, declarant served the PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER by posting to the website or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's August 7, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of November, 2002, at San Diego, California.

Mo Maloney

The Service List

May be Viewed in

the Office of the Clerk

The Exhibit(s) May

Be Viewed in the

Office of the Clerk